Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1992

LEIF ANDERSEN, individually and as Personal Representative of the Estate of KIM ANDERSEN,

Petitioner,

vs.

SKY CRUISES, LTD., INC., a corporation,

Respondent.

Petition For Writ Of Certiorari To The District Court Of Appeal Of Florida, First District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER *MILES V. APEX MARINE CORP.*, 111 S.Ct. 317 (1990), PRECLUDES A SEAMAN FROM RECOVERING PUNITIVE DAMAGES REGARDLESS OF THE NATURE OF THE SHIPOWNER'S CONDUCT THAT INJURES OR KILLS THE SEAMAN.

PARTIES TO THE PROCEEDING

Leif Andersen, as the personal representative of the Estate of Kim Andersen, was the plaintiff in the trial court. The defendants were Sky Cruises, Ltd., and Sea-Escape, Ltd.

SeaEscape, Ltd. was dismissed by the court, and the Final Judgment was entered against Sky Cruises, Ltd.

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OPINIONS BELOW

The First District Court of Appeal Decision is reported as follows: *Sky Cruises, Ltd., Inc. v. Andersen,* 1992 AMC 1333 (Fla. 1st DCA 1992), 592 So.2d 756 (Fla. 1 DCA 1992), *cert. denied, Andersen v. Sky Cruises, Ltd.,* Case No. 79,452 (S.C.Fla. June 24, 1992). A copy of the decision is contained in the Appendix to the Petition. (App. 1)

The Order of the Florida Supreme Court denying Petitioner's Writ of Certiorari is included in the Appendix. (App. 2).

The Order by the trial judge denying the post-motions of the defendant is also included in the Appendix, (App. 3 & 4), as well as the Final Judgment entered by the court.[1]

STATEMENT OF JURISDICTIONAL GROUNDS

The Petitioner invokes the discretionary jurisdiction of this Honorable Court pursuant to the provisions of 28 U.S.C. § 1254(1). The following is the course of proceedings leading to this Petition:

i. Final Judgment in the amount of 6.1 million dollars (six million represents punitive damages) was entered by the Florida trial court on December 11, 1989. (App. 5).

ii. On January 15, 1992, the First District Court of Appeal, the intermediate appellate court in Florida, rendered its decision reversing the punitive damages award.

iii. On February 14, 1992, the First District Court of Appeal rendered its order denying the Petitioner's timely motion for rehearing. (App. 6).

iv. On June 24, 1992, the Florida Supreme Court (Florida's state court of last resort) entered its Order denying its discretionary review. (App. 2).

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[1] Citation to the Petition's Appendix shall be noted by App. followed by a page number. (App. ___)

This Petition for Certiorari is being filed within 90 days of the Florida Supreme Court's denial of its discretionary jurisdiction. (rule 13 of the Supreme Court Rules).

STATUTORY PROVISIONS INVOLVED

Petitioner's suit includes a claim pursuant to the Jones Act, 46 U.S.C.A., § 688. Reference in this Petition is also made to the Death on the High Seas Act (hereinafter referred to as DOHSA), 46 U.S.C.A. § 761-8, and the Federal Employer's Liability Act (FELA), 45 U.S.C.A. § 51.

The relevant text of these Statutes are set forth in the Appendix.

STATEMENT OF THE CASE

This case involves an action for the wrongful death of a 23 year old seaman. The death occurred in Florida's territorial waters. Suit was brought by the personal representative pursuant to the Jones Act, General Maritime Law and the laws of the State of Florida. The Defendant/Respondent was found to be both the seaman's employer and the shipowner. The state law claim was dismissed by the trial court, and the case proceeded to trial on the Jones Act and General Maritime Law claims.

The jury found there was liability for negligence and that the vessel was unseaworthy. The jury awarded $100,000 for the seaman's pre-death pain and suffering, which was the only compensatory damages available

since the decedent was not survived by any dependent relatives. The jury also determined that the shipowner's conduct was so egregious as to justify the imposition of punitive damages. The jury awarded six million dollars as punitive damages. Final Judgment was entered in the amount of 6.1 million dollars (App. 5).

In denying the shipowner's post-trial motions, and affirming the jury award, the trial judge stated the following with respect to the punitive damage award:

> All affected parties having been heard, and the court finding that the motions ruled on are without merit, *and that the punitive damages awarded were not out of reasonable proportion to the malice, outrage, or wantonness of the alleged tortious conduct; it is adjudged: 1. Defendant's motion for judgment notwithstanding the verdict or, in the alternative, for new trial, is denied . . .*

The shipowner then appealed to the intermediate appellate court in Florida. During the pendency of the appeal, this court decided *Miles v. Apex Marine Corp.*, 111 S.Ct. 317 (1990) (hereinafter referred to as *Miles*) which held that loss of society damages are not recoverable in a seaman's wrongful death action, and that lost future earnings are not recoverable. Supplementary briefs were permitted by the Florida Appellate Court to address the question whether the *Miles* decision precluded an award of punitive damages to a seaman in a wrongful death case.

The intermediate appellate court ruled that *Miles* precluded an award of punitive damages in a seaman's wrongful death case, and reversed the six million dollar punitive damage award, recognizing contrary authority.

Petitioner in the instant case then sought review with the Florida Supreme Court. Review was denied on June 24, 1992. (App. 2).

This petition follows, urging this court to review the decision of the Florida Appellate Court, as well as the Federal District Courts, who have held that *Miles* precludes a seaman from recovering punitive damages under any circumstances.

REASONS FOR GRANTING THE WRIT

Although *Miles* dealt with two narrow issues concerning the elements of damages in a seaman's wrongful death case, the rippling effect of the wake of the decision has caused severe damage to the rights of seamen, who have historically been treated as wards of the courts. Although *Miles* involved a death case, the courts have extended the ruling and rationale to non-fatal injury cases. See e.g. *Murray v. Anthony J. Bertucci Const. Co., Inc.*, 958 F.2d 127 (5th Cir. 1992); *Michel v. Total Transp. Inc.*, 957 F.2d 186 (5th Cir. 1992). Thus, the interpretation of *Miles* with respect to punitive damages will be used in both death cases and non-fatal injury cases.

This Court should grant this writ in order to shut the dam before *Miles* is wrongfully utilized by the courts to further erode seaman's rights. Consider the following hypothetical situation: A shipowner knows there is a leak of poisonous gases aboard his vessel. There are six hundred crewmembers aboard. The shipowner has very important cargo he needs delivered, and to fix the leak would be not only very expensive, but would prevent

him from delivering the cargo on time, thus resulting in the loss of a substantial amount of money. Therefore, the shipowner does not tell anyone about the leak and lets the vessel sail, without him on it of course. During the voyage, the leak gets worse, and all six hundred crewmembers die. Most of the compensatory damages are minimal either due to the low earnings of the seamen, or because the seamen did not leave any dependent relatives. (In the instant case, Kim Andersen was killed, as well as three others, by lethal gases that had built up in the marine sanitation device on board the vessel. The shipowner operated the device even though it developed to a condition where it was inoperable as it was designed. Most of its major parts were no longer working. As a result, the poisonous gases developed. It was cheaper for the shipowner not to operate it as designed.). The question then becomes . . .

Does the Shipowner Escape Punitive Damages Because of this Court's Opinion in *Miles*?

Several Federal District Courts have interpreted *Miles* as precluding an award of punitive damages in a seaman's case. *In the Matter of Mardoc,* 768 F.Supp. 595 (E.D. Mich. March 22, 1991); *Donaghey v. Odeco,* 1992 A.M.C. 528 (E.D. La. June 5, 1991); *Odeco v. Cornish,* 1991 W.L. 148746 (E.D. La. July 22, 1991); *Halton v. Lykes Bros. Steamship Co.,* 771 F.Supp. 179 (E.D. Tx. Aug. 13, 1991); *Rowan Companies, Inc. v. Badeaux,* 1991 W.L. 175541 (E.D. La. Aug. 28, 1991); *Brumfield v. Zapata Gulf Marine Corp.,* 1991 W.L. 174818 (E.D. La. Aug. 29, 1991); *Stoufflet v. Apex Towing Co.,* 1991 W.L. 194759 (E.D. La. Sept. 29, 1991); *Complaint of Aleutian Enterprises, Ltd.,* 777 F.Supp. 793

(W.D. Wash., Nov. 13, 1991); *Howard v. Atlantic Pacific Marine Corp.*, 1992 W.L. 55487 (E.D. La. Feb. 28, 1992); *Waterman S.S. Corp., Lim. Procs.*, 1992 A.M.C. 1035 (E.D. La. Jan. 6, 1992); *Rollins v. Peterson Builders, Inc.*, 761 F.Supp. 918 (D.R.I. May 21, 1990).

The decision of the Florida appellate court followed the reasoning of the federal district courts that have interpreted *Miles* as precluding an award of punitive damages in a seaman's case. Although the opinion of the Florida Court speaks of a wrongful death action, the post *Miles* decisions have concluded that a non-fatal injury case should not be treated differently. See *Murray v. Anthony A. Bertucci Const. Co., Inc.*, 958 F.2d 127 (5th Cir. 1992).

The decision of the Florida Appellate Court ignored the decision of the Fifth Circuit Court of Appeals in *The Complaint of Merry Shipping*, 650 F.2d 622 (5th Cir. 1981), which held punitive damages are available under the General Maritime Law even if the Jones Act is also applicable. The Ninth Circuit Court of Appeals has held the same. *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987) (But, see *Bergen v. FV/St. Patrick*, 816 F.2d 1345 (9th Cir. 1987).

Other Federal District Courts have refused to extend *Miles* past its holding, concluding that punitive damages were not affected by the holding in *Miles*. *In Re the Complaint of Garda Marine, Inc.*, 1992 A.M.C. 1307 (S.D. Fla. 1991); *Logue v. Tidewater Inc.*, 1992 W.L. 59409 (E.D. La. March 17, 1992); *Davis v. Penrod Drilling Corp.*, 1991 W.L. 264541 (E.D. La. Dec. 2, 1991); *Hannon v. Waterman Steamship Corp.*, 1991 W.L. 88012 (E.D. La. May 22, 1991).

Suffice it to say that *Miles* has created a stir in the waters of admiralty jurisprudence. *Anglada v. Tidewater, Inc.*, 752 F.Supp. 722 (E.D. La. 1990) (holding prejudgment interest recoverable under General Maritime Law although not available under Jones Act, rejecting shipowner's argument *Miles* eliminated availability of prejudgment interest); *Smith v. Noble Drilling Corp.*, 1991 W.L. 136140 (E.D. La. July 11, 1991) (*Miles* does not preclude award of prejudgment interest); *Bachu v. Intl. Marine Terminals*, 1992 A.M.C. 705 (E.D. La. 1991) (*Miles* does not preclude award of punitive damages for failure to provide maintenance and cure); *Howard v. Atlantic Pacific Marine Corp.*, 1992 W.L. 55487 (E.D. La. Feb. 28, 1992) (*Miles* precludes punitive damages under General Maritime Law for unseaworthiness but not for claim for maintenance and cure); *Odeco Inc. v. Cornish*, 1991 W.L. 148746 (E.D. La. July 22, 1991) (*Miles* does not preclude punitive damages for failure to provide maintenance and cure).

THE AVAILABILITY OF PUNITIVE DAMAGES PRIOR TO *MILES*

Although the respondent in the instant case never argued to the trial court punitive damages could not be recovered by a seaman regardless of the egregiousness of the shipowner's conduct, petitioner believes it is important to look at the state of the law prior to *Miles*.

Punitive damages have existed under the General Maritime Law of the United States for almost two centuries. In 1817, the United States Supreme Court recognized exemplary damages as a fundamental element of the

General Maritime Law. In the *Amiable Nancy,* 16 U.S. (3 Wheat) 546, 4 L.Ed. 456 (1817), punitive damages were deemed appropriate as punishment for the type of conduct involved. Following the decision in the *Amiable Nancy,* courts continued to recognize the availability of punitive damages under the General Maritime Law. See e.g. *In Re P&E Boat Rentals, Inc.,* 872 F.2d 642 (5th Cir. 1989); *Muratore v. M/S Scotia Prince,* 845 F.2d 347 (1st Cir. 1988); *Evich v. Morris,* 819 F.2d 256 (9th Cir. 1987); *Self v. Great Lakes Dredge & Dock Co.,* 832 F.2d 1085 (4th Cir. 1985); *U.S. Steel Corp. v. Fuhrman,* 407 F.2d 1143 (6th Cir. 1969), *cert. denied* 398 U.S. 958, 90 S.Ct. 2162 (1970); *In Re The Marine Sulfur Queen,* 460 F.2d 89 (2nd Cir. 1972).

The Fifth Circuit Court of Appeals recognized the availability of punitive damages under the General Maritime Law in concluding a seaman could recover punitive damages against the shipowner upon a showing of gross negligence, or actual malice or criminal indifference which is the equivalent of reckless and wanton misconduct. *The Complaint of Merry Shipping, Inc.,* 650 F.2d (5th Cir. 1981). This includes a willful and wanton violation of the duty to maintain a seaworthy vessel.

The decision in *The Complaint of Merry Shipping* involved a Jones Act claim joined with a General Maritime Law claim for unseaworthiness. The court did not decide whether punitive damages were recoverable under the Jones Act, although it expressed doubt as to the availability of punitive damages under the Jones Act. The Ninth Circuit Court of Appeals has held punitive damages are unavailable under the Jones Act, but may be recovered under the General Maritime Law. *Kopczynski v. The Jacqueline,* 742 F.2d 55 (9th Cir. 1984); *Evich v. Morris,*

819 F.2d 256 (9th Cir. 1987). (But see *Bergen v. F/V St. Patrick,* 816 F.2d 1345 (9th Cir. 1987)).

In *McMongale v. Northeast Women's Center, Inc.,* 110 S.Ct. 261 (1989), Justice White, dissenting, recognized that *Bergen* was in conflict with *The Complaint of Merry Shipping, Inc.* Although *Bergen* was not explicitly overruled in *Evich, Evich* recognized the availability of punitive damages under the General Maritime Law without discussing *Bergen.* Thus, there may no longer be any conflict between the Fifth and Ninth Circuit.

This Court Should Grant Certiorari and Clarify the Muddy Waters

In *Pacific Mutual Life Insurance Co. v. Haslip,* 499 U.S. ___, 113 L.Ed.2d 1 (1991) this Court recognized the long time availability of punitive damages under the common law, and the important purpose of punitive damages. The need for the availability of punitive damages in seamen cases in apparent. Seamen have traditionally been recognized as a class of people subject to unscrupulous practices by shipowners, and deserving of special protection under the law as a result of their plight. Seamen are in a unique employment in that they are subject not only to the perils of the sea, but they are at the mercy of the shipowner, subject to his discipline and control, and totally dependent on him to furnish a safe workplace and seaworthy vessel. Seamen have historically been considered as wards of the Court. *Harden v. Gordon,* 11 Fed. Cas. 480 (No. 6047) (C.C. Me 1823).

This Court has summarized the plight of seamen as follows:

> The seaman, while on his vessel is subject to the rigorous discipline of the sea and has little opportunity to appeal to the protection from abuse of power which the law makes readily available to the landsman. His complaints to superior officers of unsafe working conditions not infrequently provoke harsh treatment. He cannot leave the vessel while at sea. Abandonment of it in port before his discharge, to avoid unnecessary dangers of employment, exposes him to the risk of loss of pay and to the penalties for desertion. In the performance of duty he it often under the necessity of making quick decisions with little opportunity or capacity to appraise the relative safety of alternative courses of actions. Withall, seamen are the wards of the admiralty, whose traditional policy it has been to avoid, within reasonable limits, the application of rules of the common law which would affect them harshly because of S.Ct. 1772 (1970) the special circumstances attending their calling . . . It is for this reason that remedial legislation for the benefit and protection of seamen have been liberally construed to attain that end. *Socony-Vacuum Oil Co. v. Smith*, 59 S.Ct. 262, 305 U.S. 424 (1939).

Thus, the question becomes . . .

Has *Miles* left the Seaman Defenseless???

The Federal Courts that have concluded that *Miles* precludes a seaman from recovering punitive damages reason as follows:

1. *Miles* said a seaman can recover only those damages permitted by Congress;

2. Congress has only authorized pecuniary damages in a seaman's case;

3. Punitive damages are non-pecuniary damages;

4. Therefore, where the Jones Act is applicable, a seaman can not recover punitive damages, even under the General Maritime Law.

Certiorari should be granted to clarify to the courts that they have taken an uninvited quantum leap from the holding in *Miles*. As stated by the Court in *Hannon v. Waterman Steamship Corp.*, 1991 W.L. 88012 (E.D. La. May 22, 1991), "the *Miles* decision does not provide a basis for overruling precedent recognizing the right to assert a claim for punitive damages under the General Maritime Law."

First, this court emphasized that the Jones Act and General Maritime Law may travel together:

> The Jones Act evinces no general hostility to recovery under maritime law. It does not disturb seamen's General Maritime claims for injuries resulting from unseaworthiness . . . *Miles*, 111 S.Ct. at 324.

Second, the courts, that have held *Miles* precludes an award of punitive damages, have failed to examine the purpose behind enactment of the Jones Act, and have misconstrued the reasoning and rationale of the *Miles* decision which led to the court's conclusion that loss of society damages were not recoverable in a seaman's wrongful death case.

Petitioner submits it is a quantum leap to conclude that this court has held that a seaman is limited solely to

the damages permitted under the Jones act, and no more. (Assuming arguendo punitive damages may not be recovered under the Jones Act). In *Miles,* the state of the law with respect to seaman's wrongful death cases was blowing in all directions. The extent of a seaman's recovery depended on whether the seaman was killed in territorial waters, or on the high seas. This anomaly was created because of the uncertainty of the recovery under the general maritime wrongful death recovery pursuant to *Moragne v. States Marine Lines,* 90 S.Ct. 1772 (1970). In *Miles,* this court merely put the Jones Act, DOHSA and General Maritime Law on the same boat in death cases with respect to the compensatory damages available. This court simply avoided a situation where the spouse of a seaman killed in territorial waters could recover greater compensatory damages than the spouse of a seaman killed on the high seas.

Miles does not, and should not, stand for the proposition that punitive damages cannot be recovered even if the shipowner's conduct that kills or injures the seaman is egregious enough to support such an award. Punitive damages are different than compensatory damages, and should be treated differently. There is no indication Congress, or this court in *Miles,* ever intended to deprive seamen, as a class, of the availability of punitive damages in an appropriate case. While the Jones Act may not provide for punitive damages, it does not follow that Congress intended seamen could never recover punitive damages.

There is no evidence Congress intended to preclude seamen from recovering punitive damages. The Jones Act

was enacted in 1920 to remedy a harsh situation applicable to seamen, to wit, a seaman was unable to sue his employer for negligence. *The Osceola*, 189 U.S. 158 (1903). In *Panama R.R. Co. v. Johnson*, 264 U.S. 375 (1924), this court described the relationship between the Jones Act and the General Maritime Law:

> Rightly understood, the statute [the Jones Act] neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seamen to do so. On the contrary, it brings into that law new rules drawn from another system and extends to injured seamen a right to invoke, *at their election*, either the relief accorded by the old rules or that provided by the new rules. *The election is between alternatives accorded by the maritime law*, as modified, and not between that law and some non-maritime system. (emphasis added).

The Jones Act does not specifically delineate the damages recoverable under the Act. In *Miles*, this court recognized that by incorporating Federal Employer's Liability Act (FELA), 45 U.S.C.A. § 51 into the Jones Act, Congress must have been aware that only pecuniary damages were provided for under the act. Therefore, Congress must have intended only pecuniary damages to be recoverable pursuant to the Jones Act. The leading case cited for the proposition that only pecuniary damages are available under the FELA is *Michigan Central R. Co. v. Vreeland*, 33 S.Ct. 192 (1913), which dealt with the recoverable compensatory damages in a wrongful death case. Citing the then existing common law with respect to wrongful death statutes, the court held non-pecuniary damages were nonrecoverable. The court's definition of

pecuniary damages shows the court was concerned with *compensatory* damages:

> A pecuniary loss or damage must be one which can be measured by some standard. It is a term employed judicially, not only to express the character of that loss to the beneficial plaintiffs which is the foundation of their right of recovery, but also to discriminate between a material loss which is susceptible of a pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation. *Id.* 33 S.Ct. at 196.

The pecuniary limitation on compensatory damages was based on the existing law with respect to wrongful death, citing to Lord Campbell's Act, 9 & 10 vict. Ch. 93 (1846), on which the FFLA wrongful death provision was based.

In fact, based on existing law, at that time, the court held there was no survival action. The FELA has been amended to provide a survival action. 45 U.S.C. § 59. Courts have also held that a survival action is available under the General Maritime Law. See e.g. *Azzopordi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 893 (5th Cir. 1984); *Law v. Sea Drilling Corp.*, 523 F.2d 793, 795 (5th Cir. 1975); *Barbe v. Drummond*, 507 F.2d 794, 799-800 (1st Cir. 1974); *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987).

Thus, the Jones Act was created as remedial legislation to further provide protection to seamen, not to curtail their rights! *Miles* recognized this by emphasizing General Maritime Law could supplement remedies under the Jones Act where Congress had not spoken on the

issue, but concluded Congress had specifically spoken with respect to the compensatory damages available. Congress has not spoken on the topic of punitive damages, which are totally different than compensatory damages. Thus, they should survive *Miles*, and continue to be among the arsenal of the seamen. The history of the enactment of the Jones Act demonstrates that punitive damages were not addressed. The Florida Appellate Court, as well as the Federal District Courts that have held punitives are precluded after *Miles*, have simply misconstrued *Miles*. This court should grant cert to clarify the issue.

What About Uniformity?

The shipowner's argument is punitive damages are not permitted under the Jones Act, or the Death on the High Seas Act, because of the pecuniary damage only limitation, and therefore allowing punitive damages under the General Maritime Law will create non-uniformity.

First, a close analysis of this argument reveals the leaks in the reasoning. In a non-fatal accident case, uniformity is not jeopardized because a General Maritime Law claim can always be joined with a Jones Act claim regardless of the location of the accident. In a death case, permitting a general maritime claim for punitive damages will not create nonuniformity, but instead will ensure uniformity with recoveries permitted by seamen, as a class, with other classes of individuals. Although DOHSA states only pecuniary damages are recoverable, it

is obvious this provision was intended to deal with compensatory damages as the nature of a wrongful death case is to compensate survivors for the loss of the decedent. DOHSA was specifically intended to deal with the compensatory damages available to the survivors of the seaman. Congress itself recognized that DOHSA would have to be supplemented in areas the statute did not cover. S.Rep. No. 216, 66th Cong. 1st Sess. 3; H.R. Rep. No. 674, 66th Long. 2nd Sess. 3; 59 Cong. Rec. 4482-4486. The courts, in recognizing a survival action under the General Maritime Law, have concluded General Maritime Law could fill the gap left by Congress:

> Since DOHSA is a wrongful death statute which, whether through inadvertence or design, does not address survival of action, it is entirely appropriate that the courts should fill what would otherwise be a legislative void by allowing General Maritime Law survival action based on *Moragne* to supplement DOHSA. *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 894 (5th Cir. 1984).

Any punitive damage claim in a death case would be under the general maritime survival action. Since a general maritime survival action can be joined with the Jones Act and DOHSA, punitive damages would be available regardless of where the death occurs. Thus the anomaly that was created after *Moragne*, to wit, that the compensatory damages depended on where the death occurred, is not present by permitting seamen the right to pursue punitive damages.

CONCLUSION

As set forth above, shipowners have been successfully using the *Miles* decision as a shield against the sword of punitive damages. The Florida Appellate Court, and the federal courts which have reached the same conclusion, have concluded *Miles* overruled, *sub silentio,* almost two hundred years of law. These decisions have wiped out an essential weapon for seamen in their defense of willful and wanton misconduct by a shipowner. The issue is not what conduct justifies the imposition of punitive damages. The courts are interpreting *Miles* as saying punitive damages may never be recovered by a seaman! Petitioner suggests such a conclusion is not found in the waters of *Miles,* and is a harsh, unwarranted extension of *Miles.* Punitive damages have been historically recognized as serving an essential purpose in our civil justice system. In *The Complaint of Merry Shipping,* 650 F.2d 622 (5th Cir. 1981), the Fifth Circuit Court of Appeals recognized there are no statutory restraints barring recovery of punitive damages under the General Maritime Law since this body of law is a product of judicial decision-making fashioned on the basis of tradition and policy.

This court should grant certiorari, and steer the courts in the right direction before the collisions of uncertainty results in more disasters. Petitioner respectfully submits that, pursuant to Rule 10 of the Supreme Court Rules, this case is deserving of review by this court:

a) There are conflicts among the federal district courts;

b) There is possible conflict between the Ninth Circuit Court of Appeals and the Fifth Circuit Court of Appeals, depending on whether *Bergen* has been overruled by *Evich*;

c) The Florida decision conflicts with the United States Court of Appeals on the same matter;

d) The cases involved have decided an important question of admiralty law, critical to all seamen, and there is a need for a pronouncement by this Court.

For the foregoing reasons, Petitioner respectfully suggests that this court should grant this petition and issue a Writ of Certiorari to the District Court of Appeal of Florida, First District.

Respectfully submitted,

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DATED: September 18, 1992.

APPENDIX

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SKY CRUISES, LTD., Inc., a corporation, Appellant,

v.

Leif ANDERSEN, individually and as personal representative of the Estate of Kim Andersen, Appellee.

No. 90-1815.

District Court of Appeal of Florida,
First District.

Jan. 15, 1992.

Rehearing Denied Feb. 14, 1992.

Cruise ship line appealed from award of punitive damages entered by the Circuit Court, Duval County, Mattox Hair, J., in maritime suit arising out of death of third engineer who was overcome by hydrogen sulfide gas from faulty sewage system. The District Court of Appeal held that under general maritime law, there is no entitlement to punitive damages in claim for death of Jones Act seaman based on unseaworthiness.

Reversed.

James F. Moseley of Taylor, Moseley and Joyner, Jacksonville, and Robert P. Smith, Jr., Hopping Boyd Green & Sams, Tallahassee, for appellant.

Brett Rivkind, Rivkind & Pedraza, Miami, for appellee.

PER CURIAM.

In this appeal from a maritime suit arising out of the death of a third engineer overcome by hydrogen sulfide

gas from a faulty sewage system, the defendant cruise ship line challenges the award of punitive damages. We reverse.

We need not address the other arguments presented by appellant, because we find that under general maritime law there is no entitlement to punitive damages in a claim for the death of a Jones Act seaman based upon unseaworthiness. *See Miles v. Apex Marine Corp.*, 498 U.S. ___, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990); *Haltom v. Lykes Bros. S.S. Co., Inc.*, 771 F.Supp. 179 (E.D.Tex.1991); *Rollins v. Peterson Builders, Inc.*, 761 F.Supp. 948 (D.R.I. 1991); *Matter of Mardoc Asbestos Case Clusters 1, 2, 5 and 6*, 768 F.Supp. 595 (E.D.Mich.1991). *Contra, In re Complaint of Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir.1981); *In re Complaint of Garda Marine, Inc., etc. and Naviera Turrialba, S.A., as charterer of the M/V Turrialba, for Exoneration for Limitation of Liability*, Case No. 88-2282-CIV-MARCUS (S.D.Fla. October 10, 1991).

REVERSED.

ERVIN, ZEHMER and BARFIELD, JJ., concur.

SUPREME COURT OF FLORIDA

WEDNESDAY, JUNE 24, 1992

LEIF ANDERSEN, ETC.,	*	
Petitioner,	*	CASE NO. 79,452
v.	*	DISTRICT COURT OF APPEAL, 1ST DISTRICT
SKY CRUISES, LTD., INC., ETC.,	*	NO. 90-1815
Respondent.	*	

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should dēcline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, Acting C.J., BARKETT, GRIMES, KOGAN and HARDING, JJ., concur

A True Copy
TEST:

BH

cc: Hon. Jon S. Wheeler, Clerk
Hon. Henry W. Cook, Clerk
Hon. Mattox Hair, Judge

Brett Rivkind, Esquire
James F. Moseley, Esquire
Robert P. Smith, Jr., Esquire

(SEAL)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 87-8892-CA

DIVISION: CV-O

LEIF ANDERSEN, individually, and as Personal Representative of the Estate of KIM ANDERSEN,

Plaintiff,

v.

SKY CRUISES, LTD., INC., a corporation,

Defendant.

ORDER ON MOTIONS

All affected parties having been heard, and the Court finding that the motions ruled on are without merit, and that the punitive damages awarded were not out of reasonable proportion to the malice, outrage, or wantonness of the alleged tortious conduct; that there was no indication that the jury was influenced by matters outside the record; and that there was no evidence presented regarding the net worth of defendant, Sky Cruises, Ltd., Inc., a corporation, *see Louisville and Nashville Railroad Company v. Hickman,* 445 So.2d 1023 (Fla. 1st DCA 1983); *T.D.S. Incorporated v. Shelby Mutual Insurance Company,* 760 Fed. 2d 1520 (11th Cir. 1985), it is

ADJUDGED:

1. Defendant's Motion For Judgment Notwithstanding The Verdict or, In The Alternative, For New Trial, is denied.

2. Defendant's Motion for Remittitur is denied.

3. Defendant's Motion to Tax Costs is not ruled on at this time.

ORDERED at Jacksonville, Florida, this 15th day of May, 1990.

/s/ Mattox S. Hair
CIRCUIT JUDGE

Copy to:

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Miami, Florida 33130
Attorney for Plaintiff

James F. Moseley, Esquire
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Jacksonville, Florida 32202
Attorney for Defendant

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.
GENERAL JURISDICTION DIVISION

CASE NO.: 87-8892-CA

DIVISION: CV-O

LEIF ANDERSEN, individually, and as Personal Representative of the Estate of KIM ANDERSEN,

Plaintiff,

vs.

SKY CRUISES, LTD., INC.,

Defendant.

FINAL JUDGMENT FOR PLAINTIFF

Pursuant to the verdict rendered in this action, it is:

ADJUDGED that Plaintiff, LEIF ANDERSEN, as Personal Representative of the Estate of KIM ANDERSEN, recover from Defendant, SKY CRUISES LTD., INC., the sum of SIX MILLION ONE HUNDRED THOUSAND DOLLARS ($6,100,000.00), that shall bear interest at the rate of 12% a year for which let execution issue.

Jurisdiction is reserved with respect to taxation of costs.

DONE AND ORDERED in Chambers, at Jacksonville, Duval County, Florida, on this 11th day of December, 1989.

/s/ Mattox S. Hair
CIRCUIT COURT JUDGE

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DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904) 488-6151

February 14, 1992

CASE NO. 90-01815

L.T. CASE NO. 87-8892-CA

Sky Cruises, Ltd., Inc. v. Leif Andersen, individually, etc.

Appellant(s), Appellee(s).

ORDER

Motion for rehearing and motion for rehearing en banc, filed January 30, 1992, is DENIED.

Motion for stay of mandate pending review, filed February 7, 1992, is DENIED.

By order of the Court

JON S. WHEELER
CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

James F. Moseley, Jr.
Robert P. Smith, Jr.
Brett Rivkind

Thomas C. Sullivan
Charles Lipcon

/s/ Sandra Joyner
Deputy Clerk

(SEAL)

46 USCA § 688

§ 688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

45 USCA § 51

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason or any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

46 USCA §§ 761 & 762

§ 761. Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

§ 762. Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for pecuniary loss sustained by the persons whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

Supreme Court, U.S.
FILED
OCT 22 1992
OFFICE OF THE CLERK

No. 92-504

(2)

In The

Supreme Court of the United States

October Term, 1992

LEIF ANDERSEN, individually and as Personal Representative of the Estate of KIM ANDERSEN,

Petitioner,

vs.

SKY CRUISES, LTD., INC., a corporation,

Respondent.

Petition For Writ Of Certiorari To The District Court Of Appeal Of Florida, First District

RESPONDENT'S BRIEF IN OPPOSITION

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OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

WHETHER GENERAL MARITIME LAW CREATES REMEDIES FOR A JONES ACT SEAMAN TO INCLUDE PUNITIVE DAMAGES, DESPITE *MILES V. APEX MARINE CORP.*, 498 U.S. 19 (1990).

LIST OF PARTIES

The parties to the proceeding below were the Petitioner Leif Andersen, individually and as personal representative of the Estate of Kim Andersen and Respondent Sky Cruises, Ltd., Inc. There were no other parties in the judgment sought to be reviewed.

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No. 92-504

In The

Supreme Court of the United States

October Term, 1992

LEIF ANDERSEN, individually and as Personal Representative of the Estate of KIM ANDERSEN,

Petitioner,

vs.

SKY CRUISES, LTD., INC., a corporation,

Respondent.

Petition For Writ Of Certiorari To The District Court Of Appeal Of Florida, First District

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the judgment and opinion of the First District Court of Appeal, State of Florida, reported at 592 So.2d 756 (Fla. 1 DCA 1992), *cert. denied*, Florida Supreme Court, Case No. 79,452 (Fla. June 24, 1992).

STATUTORY PROVISIONS INVOLVED

Reference in this Brief in Opposition is made to the Jones Act, 46 App. U.S.C.A., § 688, the Death on the High

Seas Act (hereinafter referred to as DOHSA), 46 U.S.C.A. § 761 et seq., and the Federal Employer's Liability Act, (hereinafter referred to as FELA), 45 U.S.C.A. § 51.

The relevant text of these Statutes is set forth in the Appendix.

STATEMENT OF THE CASE

Petitioner filed an action in the Florida Circuit Court, the original trial jurisdiction Court within the State of Florida. The Complaint involved the death of a seaman, who sustained fatal injuries aboard a ship that sailed into and out of ports in the State of Florida on a routine basis. The events leading to the casualty occurred at Jacksonville, Florida. Respondent rejects all aspects of Petitioner's statement that relate to his conclusions as to Respondent's alleged conduct.

The cause of action filed in the Florida Court consisted of three alleged claims, a Jones Act claim, a claim under the General Maritime Law of the United States, and a claim under Florida law. The Florida law claim was dismissed and is no longer a part of this action. The jury awarded $100,000 to the non-dependent estate, a fair and reasonable amount. The punitive damages issue did not go to the jury under the Jones Act but *only* under the General Maritime Law.

The appeal to the District Court of Appeal of Florida, First District, resulted in a *Per Curiam* reversal based upon *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). The Court in relying upon *Miles* held, "[W]e find that under

general maritime law there is no entitlement to punitive damages in a claim for the death of a Jones Act seaman based upon unseaworthiness". (Appendix 1).

The Petitioner/Plaintiff filed a Motion for Rehearing and Motion for Rehearing En Banc before the District Court of Appeal, First District of Florida. An Order denied those Motions.

Petitioner/Plaintiff next sought review to the Florida Supreme Court. After the case had been submitted to the Court on jurisdictional briefs, a unanimous Florida Supreme Court held, "[T]he Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied". Petitioner having exercised its appellate rights within the State of Florida now seeks additional review.

SUMMARY OF THE ARGUMENT

The holding of *Miles v. Apex* established uniformity in the area of damages in a Jones Act seaman case. It squared damages flowing from the Jones Act, Death on the High Seas Act, and the General Maritime Law. This concept has since been applied with one voice by district courts in denying punitive damages in cases of a Jones Act seaman and the General Maritime Law. No post-*Miles v. Apex* conflict exists among the circuits nor with the Florida decision involved herein. The uniformity of rulings at the lower courts show that there is no need, and indeed may never be, for a decision by this Court on

Petitioner's issue. The Petition for Writ of Certiorari to the District Court of Appeal of Florida should be denied.

THE PETITION SHOULD BE DENIED

I. PETITIONER RAISES NO QUESTION WARRANTING REVIEW BY THIS COURT

The Supreme Court of the United States has enunciated a rule regarding damages in a maritime case. This Court in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) stated this legal concept: there is a uniform rule applicable to all actions for wrongful death of a seaman whether under the Death on the High Seas Act, the Jones Act, or General Maritime Law.

The rule was correctly applied in this case to hold that pecuniary damages are all that is recoverable in a seaman's wrongful death action, not punitive damages.

It has long been established that punitive damages are unavailable under the FELA, *Gulf, Colorado, & Santa Fe Ry. v. McGinnis*, 228 U.S. 173 (1913), *Michigan Central Ry. v. Vreeland*, 227 U.S. 59 (1913), *Wildman v. Burlington Northern R.R.*, 825 F.2d 1392 (9th Cir. 1987) and *Kozar v. Chesapeake & Ohio Ry.*, 449 F.2d 1238 (6th Cir. 1971). Before *Miles v. Apex*, Courts had recognized that punitive damages were not available under the Jones Act. *Kopczynski v. The Jacqueline*, 742 F.2d 555 (9th Cir. 1984), *cert. denied* 471 U.S. 1136 (1985). For this reason, in the instant case there never was a Jones Act legal or jury issue relating to punitive damages. The sole legal issue relating to punitive damages was linked only to the General Maritime Law claim under unseaworthiness.

II. NO CONFLICT EXISTS AMONG THE CIRCUITS NOR BETWEEN THE FLORIDA DECISION AND ANY COURTS OF APPEAL WHERE THE EFFECT OF *MILES V. APEX* HAS BEEN CONSIDERED

Miles v. Apex held that there was no recovery for a Jones Act seaman for non-pecuniary loss.

Petitioner attempts to establish a "conflict". However, such assertion assumes that *Miles v. Apex* does not exist.

Petitioner is simply in error suggesting (Petition 9 and 10) that the Court of Appeals for the Fifth Circuit and the Ninth Circuit are presently in conflict over the recovery of punitive damages in an action concerning a Jones Act seaman. Petitioner is also in error that the Florida Court decision of which review is sought is in conflict with either or both of these Circuit decisions.

Neither the Fifth, Ninth, nor any of the Circuits has yet considered, in light of this Court's *Miles v. Apex* decision, the recovery of punitive damages in a claim of a Jones Act seaman under the General Maritime Law.

Without the benefit of the holding of *Miles v. Apex*, the Fifth Circuit decided in *Complaint of Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir. 1981) that punitive damages may be recoverable under the General Maritime Law. The Ninth Circuit decided in a contrary holding that neither the statutory scheme of the Jones Act nor the Death on the High Seas Act may be supplemented to include punitive damages. *Bergen v. F/V St. Patrick*, 816 F.2d 1345 (9th Cir. 1987). Contrary to Petitioner's assertion, the Ninth Circuit did not then overrule its *Bergen* decision, *sub*

silentio in *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987). There was no judicial enlargement of Jones Act remedies in *Evich*. But the allegation of conflict alleged by Petitioner is irrelevant and ill conceived. Any alleged conflict existed *before* the holding of *Miles v. Apex*.

Whatever ambiguity or uncertainty *Evich* together with *Bergen* created in the Ninth Circuit, neither then nor now is that any Rule 10 reason for this Court to interject itself to resolve a claimed intra-Circuit inconsistency of opinions. Besides, as *Complaint of Aleutian Enterprises, Ltd.*, 777 F.Supp. 793 (W.D. Wash. 1991) now holds *within* the Ninth Circuit, "the ambiguity in Ninth Circuit law can be resolved by application of the recent Supreme Court decision, *Miles v. Apex*. . . . " Whether *Complaint of Aleutian Enterprises, Ltd.* was correct in this is of course for the Ninth Circuit, not this Court, to say initially.

Far from exhibiting conflict within the Fifth and Ninth Circuits, the District Courts in those circuits now clearly understand their circuit precedent in light of the clarity of *Miles v. Apex*. See: *In re: Waterman S.S. Corp.*, 780 F.Supp. 1093 (E.D. La. 1992), *Complaint of Aleutian Enterprises, Ltd.*, 777 F.Supp. 793 (W.D. Wash. 1991), and *Anderson v. Texaco, Inc.*, 1992 W.L. 160387 (E.D. La. June 24, 1992). In the recent *Anderson* case Honorable Martin L. C. Feldman held:

> Although there are no circuit decisions directly on point, the post-*Miles* district court cases, in this district and in others, speak with one voice in concluding that punitive damages are non-pecuniary and, therefore, are not recoverable under *Miles'* interpretation of the Jones Act. . . .

Also, the Court held:

> *Miles* compels the conclusion that a plaintiff who is statutorily barred from receiving a punitive award cannot recover punitive damages by couching his claim in the judge-made general maritime law of negligence and of unseaworthiness.

Anderson v. Texaco, Inc., 1992 W.L. 160387 at pp. 2, 3.

Petitioner's claim of jurisdictional conflict amounts to an assertion that the Court should grant certiorari to reconcile a decision of a Florida State Appellate Court (applying *Miles v. Apex* in a manner consistent with the "one voice" of Federal Courts) with a Fifth Circuit decision that is considered obsolete by district courts within that very circuit.

Thus, the case for this Court undertaking such a chore, is hardly compelling.

III. THERE IS YET NO NEED, AND THERE MAY NEVER BE, FOR A DECISION BY THIS COURT ON THE QUESTION PRESENTED

The unifying effect of *Miles v. Apex* has thus far been quite evenly applied among all courts that have entered final judgment addressing punitive damages. Cases that have held that a Jones Act seaman is not entitled to punitive damages under the General Maritime Law have been squarely based upon the reasoning announced in *Miles v. Apex*. The universal application of the holding and reasoning of *Miles v. Apex* is established in: *In re: Cleveland Tankers, Inc.*, 791 F.Supp. 679 (E.D. Mich. 1992); *In re: Waterman S.S. Corp.*, 780 F.Supp. 1093 (E.D. La. 1992); *Complaint of Aleutian Enterprises, Ltd.*, 777 F.Supp. 793 (W.D. Wash. 1991); *Haltom v. Lykes Bros. S.S. Co.*, 771

F.Supp. 179 (E.D. Tex. 1991); *Donaghey v. Odeco*, 1992 AMC 528 (E.D. La. June 4, 1991); *Howard v. Atlantic Pacific Marine Corp.*, 1992 W.L. 55487 (E.D. La. Feb. 28, 1992); *Stoufflet v. Apex Towing Co.*, 1991 W.L. 194759 (E.D. La. Sept. 20, 1991); *Rowan Companies, Inc. v. Badeaux*, 1991 W.L. 175541 (E.D. La. Aug. 28, 1991); *Brumfield v. Zapata Gulf Marine Corp.*, 1991 W.L. 174818 (E.D. La. Aug. 29, 1991).

Courts across the nation, from Hawaii to Rhode Island, from Michigan to Louisiana, have been confronted with this issue and have answered it consistent with the Florida Court in the instant case, i.e. punitive damages under general maritime law are not allowable to a Jones Act seaman. To amplify, Respondent would respectfully show but a few additional cases and briefly set forth the cornerstone reasoning of these cases:

A. *In re: Mardoc Asbestos Case Clusters 1, 2, 5 and 6*, 768 F.Supp. 595 (E.D. Mich. 1991) a Jones Act seaman case, the court held, "[T]he court concludes that punitive damages may not be awarded under the Jones Act". *Id.* at 597. Then applying *Miles v. Apex*, the court stated: "If the remedies under general maritime law may be no greater than those under these federal statutes, the court must hold that punitive damages are unavailable . . . ". *Id.* at 599-600.

B. *Rollins v. Peterson Builders, Inc.*, 761 F.Supp. 943 (D.R.I. 1991), the court held, "[T]his Court is of the opinion that the *Apex* case as well as the earlier *Moragne* case indicate that the Supreme Court has set its sails toward

creating uniformity in maritime law". *Id.* at 950.

C. *La Voie v. Kualoa Ranch and Activity Club,* 1992 AMC 1493 (D.Ha. 1992), the court in citing numerous cases adopted the *Miles v. Apex* reasoning. The court reasoned that it was plainly following the Supreme Court's pronouncement that *Miles v. Apex* was an attempt at "restoring a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act or general maritime law". *Id.* at 1498.

D. *Anderson v. Texaco, Inc.,* 1992 W.L. 160387 (E.D. La. 1992) pp. 2, 3.

The pervasive scheme of admiralty remedies is predicated upon uniformity. The consistency needed in the Jones Act/Death on the High Seas Act/General Maritime Law was clearly brought into play by *Miles v. Apex*. Moreover, the interplay of employee statutes, such as the Federal Employers Liability Act with the Jones Act, must be consistent. Such result was obtained by *Miles v. Apex*.

The Petitioner requests that this Court consider his Petition by deviating from this rule of uniformity. As a basis for such deviation, the Petitioner suggests the *Amiable Nancy,* 16 U.S. (3 Wheat.) 546 (1817). This infrequently cited case is even less frequently read. The facts of the case arose one hundred seventy-five years ago involving circumstances that are hardly understood today and never confronted today. However, the ruling of the case has nothing to do with the employee's statutes that were enacted nearly a century later. First the case was a case for "marine trespass". Secondly, the issue was not related to personal injury or General Maritime Law, but was a

peculiar circumstance of privateers engaging in pillage and plunder on the high seas. Thus, the *Amiable Nancy* is not a basis for Petitioner to assert that a Jones Act seaman's unseaworthy claim supports punitive damages.

Petitioner attempts to assert "uncertainty" in the *Miles v. Apex* ruling concerning a Jones Act seaman's rights under the General Maritime Law by citing a few cases. However, these cases are readily distinguishable in factual and legal circumstances from the instant case. Petitioner's attempt to create uncertainty fails because of his tortuous reasoning and the prevailing uniformity of the law.

In *Hannon v. Waterman S.S. Corp.*, 1991 W.L. 88012 (E.D. La. May 22, 1991) cited by Petitioner, the Magistrate Judge was confronted with an issue where the Plaintiff was *not* identified as a Jones Act seaman. More importantly, this was a case against an asbestos manufacturer not against a vessel owner involving a Jones Act seaman.

Petitioner relies on *Bachu v. Int'l. Marine Terminals*, 1992 AMC 705 (E.D. La. Sept. 27, 1991). While a seaman's case, it addresses the issue of maintenance and cure, which is a separate and distinct area of the law. A maintenance and cure ruling does not create an inconsistency, since the cause of action finds its source in contract, not tort. Moreover, Congress has never attempted to codify or modify the ancient tradition of maintenance and cure. *Collinsworth v. Oceanic Fleet, Inc.*, 1991 W.L. 165732 (E.D. La. Aug 20, 1991). Maintenance and cure is not and never was an issue in this case.

As to *In re: Complaint of Garda Marine, Inc.*, 1992 AMC 1307 (S.D. Fla. Oct. 10, 1991) cited by Petitioner, the

matter rests upon preliminary pleadings relative to all party plaintiffs, be they seaman, harbor worker, and other non-seaman. The shotgun motion was denied as to *all* claims.

Finally, there are two cases, *Logue v. Tidewater, Inc.*, 1992 W.L. 59409 (E.D. La. March 17, 1992) and *Davis v. Penrod Drilling Corp.*, 1991 W.L. 264541 (E.D. La. Dec. 2, 1991) that involved a Jones Act seaman. Only preliminary hearings were conducted. Neither advanced to trial. *Logue v. Tidewater, Inc.*, 1992 W.L. 59409 (E.D. La. March 17, 1992) was dismissed by joint stipulation of the parties. *Davis v. Penrod Drilling Corp.*, 1991 W.L. 264541 (E.D. La. Dec. 2, 1991) was closed on a 60 day order of dismissal entered on December 19, 1991.

The general policy of Supreme Court Rule 10 is, of course, that potential conflicts among federal and state courts on important questions of federal law be resolved by thorough consideration in those courts, if possible, before taking recourse to this Court. Until any Court of Appeals in any circuit considers *Miles v. Apex* or until the Fifth Circuit reconsiders *Merry Shipping* in light of *Miles v. Apex* and finds that the *Merry Shipping* rule survives, there will be no unsettling of precedent in that or any circuit such as would require attention by this Court.

CONCLUSION

Miles v. Apex has been uniformly and correctly applied to the issue of punitive damages. There is no traditional application of ancient punitive damage law in

personal injury maritime matters that override the statutes. There are no conflicts between Circuits of the United States since *Miles v. Apex*. The Florida decision does not conflict with any United States Court of Appeals on the same matter, since *Miles v. Apex*. There are no conflicts within the State of Florida. The issue is not a significant one since *Miles v. Apex* is being properly interpreted by the Courts below.

For the foregoing reasons, Respondent respectfully suggests that this Court deny the Petition for Writ of Certiorari to the District Court of Appeal of Florida, First District.

Respectfully submitted,

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DATED: October 22, 1992.

APPENDIX

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SKY CRUISES, LTD., Inc., a corporation, Appellant,

v.

Leif ANDERSEN, individually and as personal representative of the Estate of Kim Andersen, Appellee.

No. 90-1815.

District Court of Appeal of Florida,
First District.

Jan. 15, 1992.

Rehearing Denied Feb. 14, 1992.

Cruise ship line appealed from award of punitive damages entered by the Circuit Court, Duval County, Mattox Hair, J., in maritime suit arising out of death of third engineer who was overcome by hydrogen sulfide gas from faulty sewage system. The District Court of Appeal held that under general maritime law, there is no entitlement to punitive damages in claim for death of Jones Act seaman based on unseaworthiness.

Reversed.

James F. Moseley of Taylor, Moseley and Joyner, Jacksonville, and Robert P. Smith, Jr., Hopping, Boyd Green & Sams, Tallahassee, for appellant.

Brett Rivkind, Rivkind & Pedraza, Miami, for appellee.

PER CURIAM.

In this appeal from a maritime suit arising out of the death of a third engineer overcome by hydrogen sulfide gas from a faulty sewage system, the defendant cruise ship line challenges the award of punitive damages. We reverse.

We need not address the other arguments presented by appellant, because we find that under general maritime law there is no entitlement to punitive damages in a claim for the death of a Jones Act seaman based upon unseaworthiness. *See Miles v. Apex Marine Corp.*, 498 U.S. ___, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990); *Haltom v. Lykes Bros. S.S. Co., Inc.*, 771 F.Supp. 179 (E.D.Tex.1991); *Rollins v. Peterson Builders, Inc.*, 761 F.Supp. 948 (D.R.I. 1991); *Matter of Mardoc Asbestos Case Clusters 1, 2, 5 and 6*, 768 F.Supp. 595 (E.D.Mich.1991). *Contra, In re Complaint of Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir.1981); *In re Complaint of Garda Marine, Inc., etc. and Naviera Turrialba, S.A., as charterer of the M/V Turrialba, for Exoneration for Limitation of Liability*, Case No. 88-2282-CIV-MARCUS (S.D.Fla. October 10, 1991).

REVERSED.

ERVIN, ZEHMER and BARFIELD, JJ., concur.

46 USCA § 688

§ 688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

46 USCA §§ 761 & 762

§ 761. Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

§ 762. Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

45 USCA § 51

§ 51. Liability of common carrier by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several State or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason or any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.